

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 23 OF 2006

Rajesh Chandivale,
son of Laxman Chandivale,
major, service, residing at
St. Pedro, Old Goa, Tiswadi,
Goa.

... Petitioner

versus

The State of Goa
through the Public Prosecutor
attached to Hon'ble Bombay
High Court at Panaji, Goa.

... Respondent

Mr. T. George John with Ms. Katakya K.M., Advocates for the
Petitioner.

Ms. Winnie Coutinho, Public Prosecutor for the
State/Respondent.

CORAM : N. A. BRITTO, J.

DATE : 28TH SEPTEMBER, 2006.

ORAL ORDER

Heard Mr. T. George John, the learned Counsel on

behalf of the petitioner and Ms. Winnie Coutinho, the learned Public Prosecutor on behalf of the State/Respondent.

2. This petition has been filed by the accused in C.C.No.184/2001/B in which the accused is being prosecuted for having committed offences punishable under Sections 279, 338 I.P.C.

3. In the course of the trial, the injured Navso Gosavi was examined as PW2. It appears that the said Navso Gosavi had made two different statements to the effect that at one stage he stated that he was conscious after the accident but at another stage he stated that he was unconscious after the accident, and, with a view to clarify the inconsistency in the said statements the prosecution filed an application dated 3-6-2003 with a view to re-examine the said witness. The said application came to be rejected by the learned trial Court by Order dated 21-10-2003 but without assigning any reason. The prosecution filed a revision against the said Order of the learned J.M.F.C. which came to be allowed by Order dated 19-7-2006. It appears that before the learned Sessions Judge it was urged on behalf of the

accused that the impugned Order dated 21-10-2003 of the learned Magistrate was an interlocutory Order and as such the revision petition was not maintainable. However, the said objection came to be overruled by the learned Sessions Judge by observing that the impugned Order was certainly a final order in the sense that it deprived the prosecution from re-examining the witness for the purpose of explaining or elucidating the truth and therefore the bar created under Section 397(2) of the Code of Criminal Procedure, 1973(Code for short) did not come in the way of entertaining the said revision.

4. Mr. George John, the learned Counsel on behalf of the petitioner/accused contends that the impugned Order of the Magistrate in refusing to recall the said witness for re-examination was an interlocutory Order and therefore the said revision was not maintainable. The learned Counsel therefore contends that the impugned Order dated 19-7-2006 of the learned Sessions Judge is erroneous, illegal and therefore deserves to be set aside. In support of his submission, the learned Counsel has placed reliance on the case of **State v. Tmt.Indirakumari and others**(2003 CRI.L.J. 4749).

5. That was a case where applications were filed under Section 311 of the Code for summoning three witnesses, cited in the charge-sheet and also for recalling another witness. The said applications were rejected by the Special Court. After referring to a number of decisions of the Hon'ble Supreme Court, in para 10 of the judgment, the learned Single Judge observed that "it is clear from the above decisions that by virtue of the Order passed in any petition and if the Order would result in culminating the proceedings, then the same cannot be termed as "interlocutory" in nature, as envisaged in Section 397(2) of the Code and Section 19(3)(c) of the Prevention of Corruption Act. It is not the case of either parties that by allowing or dismissing the petitions filed by the prosecution, the entire prosecution proceedings were lapsed or terminated or culminated. By applying the above test, I hold that the impugned Orders are in the nature of interlocutory Orders. In such circumstances, in the light of specific bar, under Section 19(3)(c) of the Prevention of Corruption Act, the same cannot be challenged by way of revision".

6. On the other hand, the learned Public Prosecutor Ms. Winnie Coutinho contending that the impugned Order of the learned Magistrate was not an interlocutory Order has placed reliance on the case of **Madhu Limaye v. State of Maharashtra** (AIR 1978 SC 47). The learned Public Prosecutor has referred to the said decision with reference to para 15 which reads as follows:-

"An order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of Section 397(2)".

7. The prosecution could have re-examined the said Navso Gosavi after his cross-examination was completed on 2-6-2003 but that was not done and subsequently on the next day i.e. on 3-6-2003 the application for his re-examination came to be filed by the learned Public Prosecutor which came to be dismissed by the learned Magistrate by Order dated 21-10-2003.

8. As in the case of the **State v. Tmt. Indirakumari and others**(supra) as well as in the case of **Rajendra Kumar Sitaram**

Pande and others v. Ulitam and another(1999 AIR SCW 660) the Apex Court has stated that the discretion in the exercise of revisional jurisdiction should, therefore, be exercised within the four corners of Section 397, whenever there has been miscarriage of justice in whatever manner. Under sub-section (2) of Section 397, there is a prohibition to exercise revisional jurisdiction against any interlocutory Order so that inquiry or trial may proceed without any delay. But the expression "interlocutory Order" has not been defined in the Code. In **Amar Nath v. State of Haryana**((1977) 4 SCC 137), this Court held that the expression "interlocutory Order" in Section 397(2) has been used in a restricted sense and not in any broad or artistic sense and merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties and any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order. In **Madhu Limaye v. State of Maharashtra**(supra) a three Judge Bench of this Court has held an order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding cannot be held to be an interlocutory

Order. In **V.C. Shukla v. State**(1980 Supp SCC 92) this Court has held that the term "interlocutory Order" used in the Code of Criminal Procedure, 1973 has to be given a very liberal construction in favour of the accused in order to ensure complete fairness for the trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi final. This being the position of law it could not be appropriate to hold that an order directing issuance of process is purely interlocutory and therefore the bar under sub-section (2) of Section 397 would not apply. The Supreme Court then proceeded to hold that the order issuing process was intermediate or quasi final and therefore the revisional jurisdiction under Section 397 could be exercised against the same.

9. One of the feasible tests to find out whether an order is intermediate or interlocutory is to see whether it possesses the characteristic and scope of finality and may adversely affect a valuable right of the party or decide an important aspect of the trial. In the case at hand, the learned Magistrate had merely

declined to re-summon the said witness for the purpose of re-examination and in such a situation it could be said that it was of purely interim nature which did not decide or touch any important rights or liabilities of the parties as contemplated in the case of **Amar Nath v. State of Haryana**(supra). It also could not be said to be intermediate or quasi final in that it would bring to an end any stage in the proceeding. In my view, an order refusing to re-summon a witness for purpose of re-examination is purely an interim or interlocutory order, revision against which is clearly barred under Section 397(2) of the Code. I am supported in my view by the Division Bench of Jammu and Kashmir High Court in the case of **S. K. Mahajan v. Jammu Municipality**(1982 CRI.L.J. 646) wherein it has also held that an order refusing to summon a witness under Section 540(new Section 311), is an interlocutory order against which no revision would lie.

10. In the light of the above, the impugned Order of the learned Magistrate, being an interlocutory order, the learned Sessions Judge was not entitled to interfere with the same. Consequently, the petition deserves to succeed. The impugned

Order of the learned Sessions Judge dated 19-7-2006 is hereby set aside.

N. A. BRITTO, J.

RD